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Who Gets What Where, and How?

**“Proposed funded service areas”:
what they are, what differences they make**

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The Notice of Funds Availability (NOFA) – about which much has already been written – puts an end to months of speculation about how, exactly, the government plans to allocate the billions of dollars earmarked for broadband development. Now we know . . . or at least we have a better idea.

The Feds are doling out the stimulus cash based both on demographic considerations and on the level of broadband service already available in the areas proposed to be served. And to complicate matters, the funds are being distributed through two separate but partially overlapping programs – the Broadband Initiatives Program (BIP), and the Broadband Technology Opportunities Program (BTOP). The fun comes in trying to figure out who gets what under which program.

Some helpful definitions – The decisional criteria for both BIP and BTOP include, in particular, two crucial factors: whether the area to be served by the applicant is “rural”; and whether that area is “unserved” or “underserved.” A quick summary of those terms for BIP/BTOP purposes:

“*Area*” – For both programs, applicants must specify the “area” to which the funds would be applied. The precise “proposed funded service area” (PFSA) covered by any proposal is self-determined by the applicant. Each PFSA can be composed of as many contiguous census blocks as the applicant proposes to serve, with census blocks being the smallest demographic metric used by the Census Bureau. Service to entire census blocks is required (absent a waiver from the administering agency).

“*Rural*” – Another consideration common to both programs is the “rural” character of the PFSA. An area is “rural” if it is outside of any city, town or incorporated area that has a population that is greater than 20,000 inhabitants and if it is also outside of an urbanized area adjacent to a city with a population greater than 50,000 inhabitants. Whether an area is “rural” is determined by information derived from the last decennial census, which was the 2000 census.

“*Unserved*” v. “*Underserved*” – According to both RUS and NTIA, an area is “unserved” if terrestrial broadband (minimum advertised speeds of “at least” 768 kbps down and 200 kbps up, fixed or mobile) is not available to 90% or more of the households in the area.

An area is “underserved” if it features any of the following three characteristics: (1) no more than 50% of the households have access to facilities-based, terrestrial (fixed or mobile) broadband service (minimum advertised speeds of at least 768 kbps down and 200 kbps up); (2) no fixed or mobile broadband service provider advertises downlink speeds of three megabits per second (Mbps) or more for the area; or (3) 40% or fewer of the households in the area subscribe to broadband service.

Note that the availability of broadband service from satellite – as opposed to terrestrial – carriers is *not* a factor in determining whether an area is unserved or underserved.

Now that we have some sense of what these terms mean, let’s look at how they play out in the application process.

BIP – Strictly “rural”

The BIP money is intended for use in rural unserved or underserved areas. BIP funds are available for “last mile” and “middle mile” broadband infrastructure projects in PFSAs that are: (a) at least 75% rural *and* (b) without access to broadband services or underserved with broadband services. *If you propose service to an area that is at least 75% “rural,” you MUST apply through the BIP.*

BTOP – Not necessarily rural, but definitely unserved/underserved

If your project does not qualify for BIP funds, it may still qualify for BTOP funding. BTOP funds are also available for “last mile” and “middle mile” projects. The major difference between BIP and BTOP is that BIP is focused exclusively on *rural* unserved or underserved areas, while BTOP is focused upon unserved or underserved areas *whether or not* they happen to be “rural”. Thus, presumably, a census block consisting of a population density like that of Soho in Manhattan would qualify as long as it can be demonstrated that the census block is either unserved or underserved.

The most difficult eligibility criterion applicants will face is determining broadband service availability. Unfortunately, neither RUS nor NTIA has offered any advice on exactly how that determination will be made. The NTIA and RUS define broadband speed in any area as the speed advertised by the service provider, with the focus on the “least” advertised speed. But in real life, a network operator will offer peak speeds and average speeds, and may advertise speed ranges.

Moreover, a network operator's service literature or contracts may provide that speeds lower than advertised may be experienced. Do such fine-print provisions establish or affect the operator's "advertised speed"? Because neither NTIA nor RUS has addressed this issue, it's hard to say. However, we believe it wise to ignore such fine-print qualifications on speed limits in this context. Rather, applicants should look instead to the slowest speed which the operator actually advertises, since that is the minimum a prospective customer (*i.e.*, somebody who does not have immediate access to service literature or formal access agreements) can expect.

Further complicating the speed issue is the pesky quirk that wireless carriers tend to advertise speeds on a nationwide, rather than local market-by-market, basis. AT&T Mobility's advertisement of dongle speeds illustrates this dilemma. In a press release dated June 4, 2008, AT&T announced new dongle download speeds of between 700 kbps and 1.7 Mbps and upload speeds between 500 kbps and 1.2 Mbps that will be available in "nearly 350 major metropolitan areas." So what is the advertised minimum data speed in my particular PFSA? What defines the limits of a "metropolitan area" as AT&T uses that term? How is wireless coverage defined? Neither NTIA nor RUS has addressed these issues. Based upon our belief that those who guess wrong on the outcome of these issues will not get the benefit of the doubt, we suggest that applicants err on the conservative side.

As noted, the agencies will fund two different types of broadband infrastructure projects: "last mile" projects, in which service to end users or end user devices is the predominant use of the infrastructure; and "middle mile" projects, in which the infrastructure is used to support the last mile portion with point-to-point backhaul, special access, or some other transport infrastructure. The discussion above focused upon the areas where "last mile" facilities would be built. "Middle mile" projects must connect at least two points. For "middle mile" facilities to qualify for BIP funds, the proposed funded service area must be at least 75% rural and at least one terminus of the project must be within an area that is "unserved" or "underserved." For BTOP funds, a "middle mile" project is eligible if at least one connection terminates in an underserved area.

All of these factors make the careful selection and definition of an applicant's proposed service area a critical part of the process. Failure to meet the "rural" and "unserved" or "underserved" tests can result in either outright disqualification or less favorable consideration for your application. Accordingly, extreme caution should be exercised in the initial design of the proposed project to avoid being shut out at the starting gate.